

No. 48458-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

TED SPICE,


Appellant,

vs.

ESTATE OF DORIS MATHEWS,

Respondents

APPELLANT'S OPENING BRIEF

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Jonathan Baner, WSBA: 43612
724 S. Yakima Ave
Tacoma, WA 98405
Telephone: (253) 212-0353
Facsimile: (253) 237-1859
Attorneys for Appellant, Ted Spice

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I. INTRODUCTION

This case involves several creditor claims by the appellant Ted Spice (“Spice”) against the Estate of Doris Mathews (“the Estate”) based upon the actions of the Estate, after the death of decedent Doris Mathews.

Spice met Ms. Mathews when he rented a residence from her while searching for a home to purchase for himself. Spice and Ms. Mathews were close friends that became business partners. The two had created a vision of a development in Puyallup, WA that converted several existing residential properties into commercial warehousing with accompanying office spaces. They created Plexus Investments LLC (“Plexus”) as the legal vehicle to make their vision come to be.

Subsequent to the demise of Ms. Mathews, Spice and the Estate have become embroiled in multiple disputes as the Estate withdrew from the development plan. Litigation separate from this appeal resulted in a jury verdict that bound together Spice and the Estate as co-owners in the residential properties. Thereafter, the Estate, as a majority owner, was placed by the trial court in charge of managing the properties. The instant litigation largely flows from that division and subsequent actions by the Estate in controlling the properties.

Although tenants in common of the properties, Spice was forbidden from any meaningful use of the properties and was relegated to receiving

rental proceeds (which the Estate caused to dissipate) and helplessly watch as the properties deteriorated under the poor stewardship of the personal representative. The Estate misappropriated rental funds, committed waste, ruined mortgage modifications, incurred mortgage penalties levied against the properties, refused to make contributions, and repeatedly (and improperly) attempted to transfer title to co-owned properties into her personal bankruptcy estate in defiance of two probate orders.

The operating agreement of Plexus provided that membership would pass to the heirs and only unanimous consent allowed withdrawal, and, as such, the Estate was a member of Plexus. Spice, as the managing member of Plexus caused it to continue to make investments and sought contributions from the Estate to meet the ongoing needs of Plexus including costs incurred in litigation essential to permitting the LLC's development project to come to fruition. The Estate's personal representative, however, elected to sit idly and hope for a favorable result in the litigation, and, when no favorable result occurred, the Estate refused to make any contributions.

II. IDENTITY OF APPELLANTS

Appellant Ted Spice is an individual residing in Washington State.

III. ASSIGNMENTS OF ERROR

1. The superior court incorrectly granted summary judgment in favor of the defendant Estate.
2. The superior court incorrectly concluded that the decedent of the Estate ceased being a member of Plexus Investments LLC following her death such that the Estate owed no obligations to the LLC.
3. The superior court incorrectly dismissed Spice's claim for waste based on the incorrect factual conclusion that the Estate was not managing the relevant properties when the waste occurred.
4. The superior court incorrectly dismissed Spice's breach of fiduciary relationship claims by concluding that the Estate, as a co-owner or otherwise, had no fiduciary relationship to Spice.
5. The superior court incorrectly determined that Spice had presented no evidence of misappropriation of funds.
6. The superior court abused its discretion in refusing to allow Spice a motion for a continuance of the summary judgment motion.
7. The superior court incorrectly denied Spice's motion for reconsideration.
8. The superior court incorrectly denied Spice's motion to submit additional materials.
9. The superior court incorrectly awarded the Estate \$30,000 in attorney fees, and denied Spice attorney fees.

10. The superior court, in awarding attorney fees, provided an insufficient basis for the amount of the award to the Estate.
11. Plexus and the Living Trust of Doris Mathews are indispensable parties.
12. The superior court ignored evidence of the Estate misappropriating Spice's rental funds.

IV. STATEMENT OF ISSUES

1. Whether under the terms of the Plexus Investments LLC operating agreement a member's estate is liable for contributions or for breaches of the agreement?
2. Whether the facts presented by Spice for waste are sufficient to raise a genuine issue of material fact for trial regarding waste of co-owned properties by the Estate?
3. Whether the Estate as a co-owner or otherwise had a fiduciary relationship to Spice?
4. Whether the evidence presented by Spice, including a declaration from an expert account testifying that the Estate misappropriated funds, is sufficient to raise a genuine issue of material fact for trial?

5. Whether the trial court abused its discretion in failing to grant Spice a continuance of the summary judgment to conduct additional discovery?
6. Whether the trial court should have granted Spice's motion for reconsideration?
7. Whether Spice should have been permitted to present additional evidence, and, whether the denial of the request to submit additional material requires a *Burnet* analysis?
8. Whether the trust of Doris Mathew or Plexus was an indispensable party?
9. Whether the Estate was entitled to seek attorney fees for general litigation fees when the parties were limited to seeking such relief "based on prior rulings" of the trial court?
10. Whether a court must explain its basis for determining the amount of an award of attorney fees?

V. **Statement of the case**

A. **Background Facts**¹

¹ As a primary contention on appeal is that the trial court did not properly consider the factual allegations raised below and due to the number of factual claims, most of the factual background includes arguments regarding the facts presented and is discussed in more detail *infra* at VIII.

In January 2014, Spice and Ms. Mathews created Plexus with the express purpose of developing Ms. Mathews properties. CP 586.

This case primarily concerns six properties. Pursuant to the 2012 Estate litigation the Estate and Spice became co-owners of certain properties summarized as follows:

<u>Common address</u>	<u>Referenced as</u>	<u>Estate ownership</u>	<u>Spice Ownership</u>
11003 58 th St. Ct. E. Puyallup, WA ²	“the Triplex”	75%	25%
11007 58 th St. Ct. E. Puyallup, WA	“11007 House”, a 2 bedroom home	75%	25%
11305 58 th St. Ct. E. Puyallup, WA	“11305 Yellow House” or “11305”	33% ³	67%
11004		75%	25%

² This common address is for the entire 3.84 parcel was the location for the warehouse development.

³ 11305 was originally awarded 100% to the Estate, but Spice subsequently acquired interests in it CP 310. See also CP 796 (requiring an accounting be provided to Spice that indicates the “details of the itemization of Mr. Spice’s . . . 1/3 share of 11305.”). On appeal the percentage ownership is not relevant as that controls the amount Spice would seek, not, as is on appeal, whether the ruling of the lower court should be reversed.

11011		75%	25%
Kitsap County Acreage	Kitsap Parcel	50% ⁴	50%

CP 169-170, 172-175.

The amended complaint sought contributions from the Estate for legal fees, and other operating expenses of Plexus per the operating agreement as well as damages against the Estate for mismanagement of and waste on co-owned properties causing a loss of \$32,000 in income to Spice from rent and additional expenses for utilities, taxes, and “excessive mortgage debt” including unnecessary penalties imposed by lenders. CP 30-32.⁵

Spice also presented a claim for \$375,000 worth of equity in a triplex building at 11003 58th St. Ct. E. Puyallup, WA (the “triplex”) resulting from the Estate’s failure to repair or shut off water to a damaged water supply line. Similarly, Spice sought \$3,000 in damages for a water leak at 11305 58th St. Ct. E. Puyallup. The second water damaged property is actually 11007 and not 11305. This typographical error is discussed *infra* at VIII-E-ii-4. Spice also sought recovery for misappropriation of funds and breach of fiduciary duty by the estate (in part through its personal

⁴ Subsequent to the events complained of here Spice’s interest in the Kitsap Parcel was transferred to Paul Pasyuk. See CP 304, 335.

⁵ Although below Spice sought to recover unpaid wages under a breach of contract or under an unjust enrichment theory, the trial court’s decision regarding timeliness of those claims were not appealed. CP 782-83.

representative) regarding claims that the “Defendants took out several credit card, business and personal loans in the name of Plexus Investments, LLC, concealed and misused funds, and never repaid any of the funds they had taken from the LLC.

Management responsibilities have changed over time. During decedent Doris Mathews lifetime Spice had assumed management and maintenance responsibilities. See CP 285-86. Subsequent to her demise and until October 2012 Spice continued to manage the co-owned properties. See CP 285-86. Thereafter the Estate, through its personal representative, assumed all responsibility for management and wrote to tenants that “[u]nder no circumstances should any rent payments or any other payments be made to Ted Spice . . . Furthermore, Jeff Payne is no longer to do any maintenance work on any unit or grounds.” CP 361.

As disputes arose Spice motioned the court to appoint a property manager and the motion was granted⁶ on December 21, 2012. CP 66-67, 243-244. SJC Management took over management⁷ and Spice became restrained from *any* management. See CP 68-71. Since March 2015 Plateau Management has been managing. CP 83-84.

B. Facts relating to continuance

⁶ The order required the personal representative to select and hire a professional property manager. CP 244.

⁷ The period of management by SJC is vigorously contested by the parties as discussed *infra* re: damage to the Triplex.

In May 2014 Spice filed two pro se complaints: 1. Spice v. Estate of Doris Mathews and 2. Plexus Investments LLC and Spice v. Estate of Doris Mathews (collectively “Spice Pro Se Complaints”). The Spice Pro Se Complaints were ultimately dismissed by Spice because it was intended that the amended complaint in the Creditor Cases (on December 16, 2014) fully incorporated the Spice Pro Se Complaints thus turning four matters into two. CP 284-85. The amended complaint, however, failed to include claims by Plexus LLC against the Estate. CP 28-35. It was Spice’s intention to add the claims of Plexus LLC against the Estate. CP 272, 284-85. Additionally, as related to the continuance and discussed *infra* at VIII-I Spice was still engaged in discovery attempts.

C. Breach of fiduciary duties

i. Waste claims

The Estate was placed by the trial court in charge of the co-owned properties and notified all relevant tenants in November 2012. CP 361. On November 16, 2012 the trial court permitted the personal representative of the Estate non-intervention powers. CP 64. However, the trial court required the personal representative to give Spice notice of intent to make repairs costing more than \$5,000 or an intent to negotiate a new loan or re-financing on co-owned property. On March 29, 2013 the trial court removed Spice from any rights relating to the properties other than receipt

of rent by ordering that “Spice is hereby restrained from being involved in any property management duties on any [co-owned] properties.” CP 68. Spice was also prohibited from “any . . . contact with utility companies and lenders.” CP 69.

Spice’s claims for mismanagement stem, in part, from unpaid rental income. Prior to the Estate’s active management of the properties Spice was able to keep all properties in good condition and leased such the properties were generating \$6,550 per month. CP 285. Spice had accumulated over \$8,000 in surplus that was being held in reserve. CP 285. Subsequent to the Estate being placed in charge of all decisions relating to the co-owned properties the properties fell into disrepair. CP 285. The properties lost their tenants and profitability. See CP 285, 301 (“potential rent income loss \$187,300”).

Norma Woods is an accountant with Elite Tax and Financial Services. CP 35. She drafted an eight page accounting report that summarized all of Spice’s claims (“Woods Accounting”). CP 298-305. Ms. Woods calculated that the rental income, including deposits, not provided to Spice for all of the properties including deposits totaled \$46,825 (representing Spice’s 25% of the “total loss rent and revenues”). CP 300. She calculated the “total Estate obligation to Mr. Spice = \$351,313.22” considering the real property damage, rental income, taxes, mortgage deductions and

penalties, mismanagement of co-owned properties, Spice's out of pocket repair costs, and some attorney fees. CP 298-305. This includes several mortgage modification that fell through as well as penalties imposed. CP 512.

1. Water damage to the Triplex

A water leak at the Triplex began no later than February 2014. CP 342. By that time the Estate made an effort to remedy the issue in April 2014 the Triplex was a total loss. CP 298. Spice's loss is \$77,866.25 considering his fractional ownership interests. CP 253, 298.

2. Water damage to 11007 House

The 11007 House suffered water from a gushing water heater supply line for thirteen months that resulted in "damage to foundation, siding, and flooring, black mold, sub flooring in kitchen, bedrooms and bathroom due, counter tops, and cabinets." CP 282, 298. As a result of the water damage the 11007 House "is sinking in the ground." Spice partially repaired the house by spending \$2,500 of his own money. CP 298.

Unfortunately, the 11007 is a total loss. CP 298. Based on Spice's percentage ownership plus out of pocket expenses Spice's losses were computed at \$19,038. CP 298.

ii. **The Estate misappropriated funds derived from
co-owned properties**

Spice presented evidence that the Estate misappropriated funds derived from the co-owned properties. Because he isn't certain exactly where rental funds the Estate possessed went to, he had requested a continuance to fully ascertain evidence to answer the question. See CP 286 ("I do not know what . . . [has] been done with rental funds that have been obtained . . . still investigating); see also CP 512 (several bank subpoenas had been issued and had not been returned before the Estate moved for summary judgment and the deposition of the Mr. and Mrs. DuBois and others was intended).

Still, evidence of rental funds being misappropriated was presented. See CP 300 (\$34,200 rental funds missing from 11011), 303 (\$9,229.41 "disappeared from 11003 account" and \$5,643.68 disappeared from 11305 Yellow House account). On reconsideration Ms. Woods stated with more certainty "[a]fter reviewing the records including bank records of the Estate, bankruptcy records, property manager's owner statements, property expense records, etc. **I have determined that the Estate has failed to pay to Spice \$49,000 in rental income.**" CP 623(emphasis in original).

**D. The Estate has refused to pay property taxes on the
Kitsap Parcel**

Spice, while a co-owner, paid \$829.26 in property taxes for the Kitsap Parcel. CP 32 (amended complaint) and CP 209. The Estate refuses to reimburse Spice or allow Spice any relief because it believes the property has no value. CP 116. The trial court made no express rulings regarding the allegation, but dismissed the amended complaint in its entirety.

E. Contributions to Plexus

Doris Mathews, while alive, created The Doris Elaine Mathews Living Trust (“the living trust”), which her last will and testament devised the residue of her estate to. CP 963-69. The living trust was created on February 1, 2005 and amended on February 6, 2007. CP 560. As of the amendment the living trust had been granted seemingly all assets of Ms. Doris Mathews. CP 581. On reconsideration it was proposed that the Doris Mathews Living Trust may actually be a member of Plexus based upon an apparent agreement to transfer. See CP 464 (“Agreement and Consent to Transfer of L.L.C. Interest Adopted by All Members of Plexus” purporting to transfer Ms. Mathews interest in Plexus to the Doris Mathews Living Trust). Because Plexus and the Living Trust were not parties to the action, and because a just adjudication of their rights cannot

be made in their absence the trial court should have permitted amendment to bring those parties into the litigation before determining their rights.

F. **Award of attorney fees**

The trial court's summary judgment allowed "either party" to assert a "request attorney fees, damages or other relief based *on a prior ruling*" of the trial court. (Emphasis added). CP 339-40. The Estate moved for attorney fees on January 8, 2016. CP 649. In its motion the Estate requested in its award of fees of "not less than \$66,389.19, or \$76,347.57 with a 15% lodestar increase."⁸

Spice, as the prevailing party on several motions earlier in the litigation where attorney fees were reserved, filed a counter "motion for fees and damages pursuant to court's prior rulings." CP 671. The prior rulings of the trial court that awarded attorney fees or reserved occurred on January 27, 2015; February 6, 2015; March 2, 2015; and June 12, 2015. CP 82, 736-37, 680-81. All of the "prior rulings" of the trial court were summarized below, and the summary was not contested. See CP 681-81, 729-31.

⁸ The Estate requested an upward adjustment from the hourly rate by pointing out that case law may permit an adjustment based on "subjective factors, including the contingent nature of the fee agreement and the quality of the work performed." CP 651 (referencing Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 598). No evidence was presented that there was any contingent fee agreement. The adjustment request was not expressly denied, but the implication was that it was denied.

On January 8, 2016 the trial court awarded attorney fees to the Estate in the amount of \$30,000 against Spice, and, denied Spice's request for attorney fees. CP 793-94. In its order the court crossed out language regarding reviewing the Lodestar factors. CP 794. The trial court provided five points for its analysis, but none of which explains the amount. The trial court indicated that:

- 1. fees are appropriate due to litigious action of Ted Spice*
- 2. Ted Spice caused Estate to incur fees as a result of his claims[,] which the Estate defended.*
- 3. Ted Spice prevailed on some motions, so the fee award takes into consideration an offset for these motions.*
- 4. Ted Spice could have addressed many claims in the prior trial and caused additional delay and fees to the estate*
- 5. Estate was ultimately successful in having claims dismissed.*

CP 794.

The trial court indicated it did not "know what the magic number in this case is," but was awarding "\$30,000, which is about half of what [the Estate] claim[s]. Part of that is offset because Mr. Spice prevailed in some matters . . . And the Estate probably could have moved this faster." January 8, 2016 RP 14:10-21.

VI. Procedural history

This dispute contains a complicated procedural history. The Estate initiated probate in January, 2010 with Donna DuBois ("DuBois") as the personal representative. CP 107. DuBois was appointed with court

intervention required.⁹ CP 38-39. The Estate and Spice were involved in a separate trial that concluded in 2012 (“2012 Estate Litigation”) and was the subject of an appeal to this Court (Spice v. DuBois, No. 44101-2-ii).¹⁰

Subsequent to the 2012 Estate Litigation Spice initiated two actions as a creditor of the Estate and against the personal representative in her capacity as a personal representative (“Spice-creditor lawsuits”) on June 5, 2013. CP 107. Spice filed an amended complaint on December 16, 2014. CP 28. The Spice-creditor lawsuits were consolidated into the probate matter on April 1, 2015. CP 36-37. At the same time Jeffery Payne also filed an action against The Estate (Pierce County Superior Court case numbers 13-2-09885-2). CP 107. Mr. Payne’s claims were assigned to Spice. CP 282.

The amended complaint sought damages as a result of several allegations: 1. Contributions from the Estate for legal fees, and other operating expenses of Plexus Investments LLC per the operating agreement; 2. Damages against the Estate for mismanagement; 3. Waste on co-owned properties stemming from water damage on two properties,

⁹ Although CP 63 is identified in the Clerk’s papers per request of appellant as “order dismissing the requirement of court intervention and (*sic*)” it is misidentified. CP 64-65, is, however, the appropriate order dismissing the requirements of court intervention provided that the Estate must still notify Spice of certain intended acts to be done on the co-owned properties.

¹⁰ This reference is not intended to cite to the unpublished case for any authority, but merely for reference purposes.

mismanagement of the properties causing a loss of \$32,000 in income to Spice from rent and additional expenses for utilities, taxes, and “excessive mortgage debt” including unnecessary penalties imposed by lenders; 4. Misappropriation of rental income. CP 30-32.¹¹ The Estate also failed to pay almost \$11,000 in property taxes (not considering the Kitsap Parcel) and kept the entirety of all tax deduction totaling about \$10,000. CP 300, 624.

Spice also presented a claim for \$375,000 worth of equity in the Triplex at 11003 58th St. Ct. E. Puyallup , WA resulting from the Estate’s failure to repair or shut off water to a damaged water supply line. Similarly, Spice sought \$3,000 in damages for a water leak at 11305 58th St. Ct. E. Puyallup. The second water damaged property is 11007 and not 11305. This typographical error is discussed *infra* at VIII-E-ii-4. Spice also sought recovery for misappropriation of funds and breach of fiduciary duty by the estate (through its personal representative) regarding claims that the “Defendants took out several credit card, business and personal loans in the name of Plexus, concealed and misused funds, and never repaid any of the funds it took from the LLC.

¹¹ Although below Spice sought to recover unpaid wages under a breach of contract or under an unjust enrichment theory, the trial court’s decision regarding timeliness of those claims were not appealed. CP 782-83.

Spice continued to assert that the Estate was withholding rental funds and cash collateral that belonged to him and also that the Estate was mismanaging co-owned properties by failing to pay mortgage and insurance. The trial court ordered accountings on February 6, 2015 (CP 82), April 2, 2015 (CP 96), June 12, 2015 (CP 102). On April 2, 2015 the Court denied a motion by Spice for contempt, but required the Estate to provide an accounting, proof of payments to the property manager, and information concerning cash collateral, account statements, payments of mortgages, taxes, insurance, and rents no later than April 15, 2015. CP 96. Spice maintains that the accounting was never provided despite repeatedly appearing in court obtaining orders compelling the Estate to provide it. See CP 96, 102, 286 (Spice still investigating what the accounting was required to disclose).

The Estate filed a motion for summary judgment that was granted on October 30, 2015. CP 338-40.¹² The trial court dismissed Spice's claims¹³ for wages based on oral promises by Ms. Mathews as barred by the time limits of RCW 11.40.051. CP 338. Interestingly, the Estate proposed the same argument in a motion to dismiss filed more than a year earlier on

¹² The summary judgment also dismissed claims assigned to Spice that are not a subject of this appeal.

¹³ The summary judgment also dismissed claims assigned to Spice that are not a subject of this appeal.

May 14, 2014. CP 18-20. The Estate, however, never noted the motion to be heard. January 8, 2016 RP 12:15 - 13:16.

On November 9, 2015 Spice filed a motion for reconsideration¹⁴ and also motioned the court to allow additional materials (a late filed declaration of Norma Woods) on November 25, 2015. CP 341 and CP 619. The Court denied both motions. CP 791.

On December 22, 2015 the Estate filed a motion for attorney fees against Spice. CP 649. On December 29, 2015 Spice filed a motion for attorney fees expressly based on “prior rulings” of the court. The trial court granted the Estate’s motion and awarded \$30,000 in attorney fees to the Estate. CP 793-94.

Spice appealed the summary judgment order, the award of attorney fees, and the refusal to permit additional materials.

VII. SUMMARY OF ARGUMENTS

The trial court incorrectly dismissed the claims of Spice like throwing the baby out with the bathwater. The trial court properly dismissed Spice and Mr. Payne’s wage claims, and thereafter all other valid claims improperly went out as well. Spice’s claims focus on the actions of the

¹⁴ The Estate has previously motioned this Court to dismiss this appeal based on the allegation that a document in support of the motion for reconsideration was filed several minutes after 4:30 PM, which is what the Pierce County Superior Court considers the end of the court day. That motion was denied.

personal representative in her capacity as personal representative of the Estate or upon the benefits provided to the Estate post-death.

Primarily on appeal Spice contends that the trial court did not properly consider evidence submitted at summary judgment. This is especially true for an accounting report prepared at great expense and difficulty. Spice presented a thorough accounting by Ms. Norma Woods of Elite Tax and Financial Services that summarized “literally thousands” of records CP 623. This accounting detailed the physical damage, unpaid property taxes, loans, rental income that was lost, loan modification issues (increased mortgage costs), unnecessary mortgage penalties, costs that Spice paid on co-owned properties, and missing rent. The trial court, in granting the Estate’s summary judgment motion, disregarded clear factual disputes regarding waste, mismanagement, and the misappropriation by the Estate of funds belonging to Spice. Given the extensive factual support Spice presented in favor of his claims the motion granting summary judgment should be reversed.

The trial court rushed to dismiss the case and improperly denied a continuance request under CR 56(f) or otherwise to allow subpoena records and important depositions to occur. A continuance was also

warranted to allow Spice to amend his complaint to bring the claims of Plexus back into the proceeding.¹⁵

Regarding the trial court's award of attorney fees the review of that decision is hampered as the trial court failed to specify the basis upon which it arrived at the calculation of \$30,000. For that reason alone that portion of the judgment should be remanded. Furthermore, Spice maintains that no award of attorney fees was warranted for the Estate.

The actions that the Estate that appear designed to damage the remaining properties of the Estate can be viewed in the context of a potential motive. The personal representative of the Estate is the sole heir and has sought bankruptcy protection for herself. This bankruptcy filing appears to guide the actions of the personal representative. The personal representative appears to intentionally act against her interest by damaging the properties, mismanaging away rental income opportunities, letting favorable mortgage workouts fall through, and causing funds to dissipate or to misappropriate them. The apparent motivation for these acts is to secure the personal representative the ability to cram down significant debts relating to the properties. This can be seen as the personal representative repeatedly attempted to declare the estate insolvent and have the properties transferred to her personal, bankrupt, estate. Each such

¹⁵ The trial court nevertheless ruled substantively on the Plexus claims by ruling against Plexus, which was not a party to the action.

attempt was denied, and then the personal representative simply deeded the properties in violation of multiple court orders.

VIII. ARGUMENT

A. Standard of review

In reviewing a summary judgment order, the Court should engage “in the same inquiry as the trial court, which is to consider all facts submitted as contained in the record and reasonable inferences there from in favor of the nonmoving party.” Phillips v. King County, 968 P.2d 871, 136 Wn.2d 946, 956 (1998). Motions for reconsideration, by contrast, are reversed only upon “a showing of manifest abuse of that discretion.” Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland, 95 Wn.App. 896, 906, 977 P.2d 639 (1999). A superior court’s refusal to grant a request for a continuance of a summary judgment motion is reviewed for an abuse of discretion. Pitzer v. Union Bank of Cal., 141 Wn.2d 539, 556, 9 P.3d 805 (2000).

Appellate courts review a trial court’s award of attorney fees utilizing “a dual standard of review [with the] trial court’s initial determination of the legal basis for an award of attorney fees [reviewed] de novo, [a]nd . . . a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion.” Cook v. Brateng, 180 Wn.App. 368, 375, 321 P.3d 1255 (2014). “A trial court

abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. In re Marriage of Littlefield, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997). "An error of law constitutes an untenable reason." In re Marriage of Farmer, 172 Wash.2d 616, 625, 259 P.3d 256 (2011).

B. Summary judgment standard

This matter comes before the Court as a result of a motion for summary judgment followed by a motion for reconsideration of an order granting the Estate's motion for summary judgment dismissing the claims of Spice. A motion for summary judgment may only be entered "if the pleadings . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A material fact is one in which the outcome of the litigation depends, in whole or in part. Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). All reasonable inferences must be considered in the light most favorable to the nonmoving party. Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

C. RCW 11.40 does not apply to the claims on appeal

Several claims below concerning misdeeds of the decedent were dismissed pursuant to RCW 11.40.100. The filing requirements of RCW 11.40.100 do not apply to the claims under appeal. The requirements only apply to “claims against the decedent.” RCW 11.40.100. Olsen v. Roberts, 42 Wash.2d 862, 865-66, (1953) sets forth the test: “[t]o constitute a claim against the estate of a deceased person, an obligation must consist of a debt incurred by or for the decedent *during his lifetime*.” (emphasis added). Spice has not appealed the trial court’s ruling regarding claims against the decedent that occurred during her lifetime. Spice’s second creditor claim complaint indicates in paragraph II “said defendant [Doris E. Mathews] has at all times acted by and through its Personal Representative and/or its agents.” CP 28. The limitations of RCW 11.40.100 should not apply to the claims on appeal which are all based upon actions of the personal representative post-death of Ms. Mathews.

D. Claims based upon Plexus Investments LLC

Primarily on appeal Spice seeks a reversal to allow a continuance for him to amend his complaint to add the claims of Plexus against the Estate and potentially against the trust established by Doris Mathews.

Spice alleged that Estate misappropriated “partnership funds . . . and unlawfully converting Plexus’ operating capital . . . took out several credit cards, business and personal loans in the name of Plexus Investments,

LLC . . . misused funds, and never repaid any of the funds they had taken from the LLC.” CP 33. Spice also alleged that he “drew on his own personal funds and took out personal loans and invested them in Plexus to cover the deficiencies caused the Defendants’ breaches of fiduciary duty . . . [and the Estate] misappropriated these new funds as well.” CP 33-34.

i. Plexus Investments LLC requires contributions to Spice

Spice and Doris Mathews signed an operating agreement for Plexus Investments, LLC. CP 586-605. Article 2 of the operating agreement provides that a “Member will not be personally liable, merely as a Member, for any debts or losses of the Company beyond the Member’s respective contributions and any obligations of the member under Article 4.” CP 588. However, Doris Mathews and Spice executed an “addendum to Plexus Investments, LLC, Plexus Investments II & any other agreement between the undersigned” wherein it was agreed that any “capital, funds, bank accounts, assets . . . or real estate” belonging to “any . . . businesses whatsoever” of Spice belong solely to Spice. CP 610. Further, they agreed in the addendum that “if any of the assets or funds are used to benefit (sic) Plexus Investment I or II or Doris Mathews [then] any debts created shall proportionately become the responsibility of Plexus Investments, Doris [M]athews and Ted Spice.” CP 610. Furthermore, Plexus is itself supposed to indemnify a member for any expenses and

losses that a member incurs in connection with the business of Plexus Investments. CP 588. The purport of the indemnification language and addendum is to compensate a member should the member utilize his own funds to advance the interests of Plexus – particularly as the benefit of the funds would flow to both members.

RCW 25.15.195(1)¹⁶, in effect at the time, requires a member of an LLC to “to perform any promise to contribute cash or property or to perform services, even if the member is unable to perform because of death.” Here, the Estate or the trust remains required to perform the agreements that Ms. Mathews made and which pass to the “heirs, legal representatives, successors and assigns” under the Plexus Operating Agreement. CP 603.

The Estate’s motion for summary judgment made not a single factual statement concerning any misappropriation of operating capital, misused funds, or misappropriation of Spice’s additional personal funds or loans to cover deficiencies caused by the Estate.¹⁷ CP 253-269.

¹⁶ Now RCW 25.15.196(1).

¹⁷ It is appropriate again to reiterate that Spice’s complaint makes its allegations against the personal representative of the Estate. CP 28. It emphasizes that “[s]aid Defendant has at all times acted by and through its Personal Representative and/or its agents.” CP. 28 (emphasis in original).

- ii. *Ownership in Plexus passed from Doris Mathews to either the Estate after her demise or to a living trust prior to death*

The trial court dismissed the claims that Spice wanted to assert on behalf of Plexus against the Estate solely because Doris Mathews “membership terminated upon her death, and the Estate does not have any duty to contribute to that entity because their predecessor . . . is no longer a member of it.” CP 339. See also October 16, 2015 RP 38:12-18 (“the estate doesn’t have any duty to contribute to Plexus since their predecessor, Ms. Mathews, is no longer a member of it.”).

Spice recognized below that the claim for a contribution from the Estate is made by Plexus, and not by Spice. That the contribution would go to Plexus, which has a debt to Spice. The trial court substantively examined the issue in the absence of Plexus as a party. Spice asserts that the rulings binding Plexus should be reversed on the grounds that Plexus cannot be bound to rulings it was not a party to.

Under the operating agreement a member’s interest in the LLC may transfers at death. See CP 46 (“all of the covenants . . . herein contained shall be binding upon . . . respective heirs.”). See also CP 593 (A Member . . . may at any time Transfer [interest in the LLC] . . . to . . . (c) heirs or devisees upon death.”). The Estate even claimed

100% ownership of Plexus when it found it convenient to do so in its inventory. See CP 972, 271.¹⁸

Alternatively, the Estate, as an assignee under RCW 25.15.250(2)¹⁹ and the operating agreement including addendums, is liable to contribute to Plexus for Spice. The Estate recognized below that under then existing law former RCW 25.15.130(1) provided that upon death member of an LLC attains the status of assignee as provided in then existing RCW 25.15.250(2). CP 114. RCW 25.15.250²⁰ assignments, as distinct from the likely “transfer” at death of membership here, nevertheless causes the assignee Estate to “receive such allocation of income, gain, loss, deduction or credit or similar item to which the assignor was entitled.” RCW 25.15.250(2)(a). RCW 25.15.250(4) provides that “[u]nless otherwise provided in a limited liability company agreement and except to the extent assumed by agreement, until an assignee of a limited liability company interest becomes a member, the assignee shall have no liability as a member solely as a result of the assignment.” The operating agreement presumably applies to heirs when the Estate closes and membership is transferred, but for

¹⁸ The summary judgment referenced the amended inventory as “in court file” rather than resubmit it as an exhibit.

¹⁹ Repealed effective January 1, 2016.

²⁰ Repealed effective January 1, 2016.

now while the Estate is active the Estate is the successor to Doris Mathews and remains liable.

iii. *The Estate owes Spice a fiduciary duty as a member of Plexus*

Plexus Investments is a member managed limited liability company. See RCW 25.15.151; see also CP 588 (“Members shall have authority to act on behalf of the Company.”). Members of a member managed LLC assume fiduciary duties to one another.²¹ See Dragt v. Dragt/DeTray, LLC, 139 Wn.App. 560, 574-75, 161 P.3d 473 (2007)

E. Breach of fiduciary duty

i. *The Estate owes Spice a fiduciary duty as a tenant in common and as the court appointed manager*

Spice and the Estate are cotenants²² of the subject properties. “Cotenants stand in a fiduciary relationship one to the other. . . . A cotenant is liable for waste if [s]he destroys the property or abuses it so as to permanently impair its value.” U.S. v. State of Washington, 520 F.2d

²¹ The relationship between the Estate and Spice may also constitute a partnership. A partnership is defined as co-ownership of a business for profit. The various properties are owned by Spice and the Estate to be rented to generate funds.

²² There isn’t apparently any dispute that the parties are tenants in common with respect to the co-owned properties. The Estate acknowledged it below. See October 16, 2015 RP 40:9-12.

676, 685 (9th Cir. 1975); accord, Eastwood v. Horse Harbor Foundation, Inc., 170 Wn.2d 380, 386, 241 P.3d 1256 (2010); see also Rayonier, Inc. v. Polson, 400 F.2d 909, 919 (9th Cir. 1968) (cotenant can maintain an action for waste against cotenant from removing timber from timber land). Further, RCW 11.48.020 requires a personal representative to keep all real properties in tenantable condition and to repair them as the need arises.²³

ii. Waste claims

Waste is defined as an act or omission that is “an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession which results in its substantial injury.” Graffell v. Honeysuckle, 30 Wn.2d 390, 398 (1948). Waste can be described as either voluntary waste or permissive waste. Dorsey v. Speelman, 1 Wn.App. 85, 87, 459 P.2d 416 (1969). Voluntary or commissive waste is “deliberate or voluntary.” Id. Permissive waste is a result of “negligence or omission to do that which will prevent injury, as, for instance, to suffer a house to go to decay for want of repair or to deteriorate from neglect.” Id.

The Estate has always been in constructive possession of the property since the trial court ordered it in charge of all management decisions. Spice was and remains forbidden to oversee his assets or

²³ No evidence was submitted that the Estate made any effort to repair any properties.

provide meaningful input in how the properties are to be utilized. CP 68-69. All of the waste allegations herein concern matters relating to the co-owned properties. The issue for each portion of the waste matters concerns whether there was “an unreasonable or improper use, abuse, mismanagement, or omission of duty.” Graffell v. Honeysuckle,³⁰ Wn.2d 390, 398 (1948).

1. Mismanagement of rental properties with regard to tenants (including deposits, screening)

Spice alleged in part that the Estate mismanaged co-owned properties with regard to tenant selection and terms. CP 30. The Estate, below, grossly mischaracterized the claims as relying “exclusively on waste resulting from a water leak” on the Triplex. At all times relevant to Spice’s claims regarding the Estate mismanaging co-owned properties used for rent the Estate was solely in charge of management responsibilities either itself or through its agent. See CP 68-69. Aside from attempting to demonstrate that SJC Management was responsible for the Triplex at times when the water damage occurred, the Estate provided no factual assertions to counter Spice’s declarations.

Despite the Estate’s mischaracterization, Spice presented substantial evidence that the Estate mismanaged the co-owned properties. Spice noted that the Estate evicted Jeff Payne who was a tenant and

provided maintenance, but after he was evicted the maintenance responsibilities were never replaced. CP 285. Evidence was presented that the Estate allowed one tenant to pile garbage without repercussion, which, in turn caused other tenants to leave and that some repairs were not completed despite funds being available. CP 285, 511. Two tenants of the triplex wrote a letter²⁴ complaining that “no maintenance or repairs are being done” on the Triplex that they were refusing to make rent payments in January and February 2013 because “SJC and the DuBois failed to maintain the garbage, water electric, the laundry room, gravel road, lawns and repairs to our unit . . . we paid \$1,700 to SJC . . . because Mr. Spice removed the gar[b]age, recycles all over the grounds, graded the road and paid the utilities.” CP 356. Those same tenants also pointed out that another tenant (of the Triplex) left because of “harassment” from either SJC or the Estate. CP 356. The letter also indicates that the final unit of the triplex had been vacant for five months “with no effort to rent it.” CP 356.

Spice pointed out that the Estate failed to collect security deposits including from a tenant that had five animals. CP 286. Spice provided

²⁴ This letters was not a sworn declaration and was submitted as part of Spice’s motion for reconsideration. It was not objected to.

evidence that the Estate made utility payments²⁵ or failed to collect rent, and thus reduced rental income, for properties when the Estate allowed the Personal Representative's sister to live on one of the properties. CP 300 and 511. The sister was also permitted to have a reduced rent. CP 511. In some instances the Estate did not even collect rent and in one instance failed to collect rent for ten months before the tenants caused extensive damage. CP 347, 511. Most tenants excessively damaged the property, which was especially troublesome given that the Estate failed to collect a number of security deposits. See CP 347-48. Spice's expert accountant determined that between October 2012 and September 2015 the total loss of "rent and revenues" was \$187,300. CP 300.

*2. Waste/Mismanagement of rental properties with
regard to physical damage to the Triplex*

It is undisputed that substantial water damage occurred to the Triplex. CP 254. The Estate admits to learning of the water damage and leak no later than early April 2014. CP 254. Spice asserts that the water damage had been occurring for thirteen months prior, that the Estate either knew or should have known of the water leak, and that the failure to repair the leak constitutes waste. CP 285-86.

²⁵ The amount was not insignificant. Spice presented evidence that between 11007 House and 11305 Yellow House \$2,440.93 of rental proceeds was spent on electricity for the tenants. CP 302

The Estate's motion for summary judgment was factually supported only by a declaration of Donna DuBois (CP 253-269). In it DuBois testified that she selected SJC Property Management to manage the properties "until it resigned effective March 31, 2014." CP 253. She indicates that she discovered damage on the Triplex on April 3, 2014. CP 253. DuBois testified that the homeowner insurance policy effective "at least February 18, 2014" did not cover the damage. CP 253. She submitted a denial letter from the insurer that the policy excludes "loss caused by: a. bursting of water pipes." CP 266-68.

Spice, by contrast, testified that the water damage to the Triplex occurred during the time period she was managing. CP 285. Spice points out that the leak had existed for 13 months prior to the April 3, 2014 alleged date of discovery. CP 285:17, 286:4-6. Spice provided an e-mail from SJC management that indicated "[n]ot long after the last eviction I notified the DuBois that the building needed repairs beyond the accounts ability to afford . . . DuBois picked up the only keys I had for the units shortly their after (sic), so SJC had no access to the units; the units were not in rentable condition." CP 292.

On reconsideration Spice clarified that the last known eviction had a physical eviction by the sheriff (as evidenced by the Sheriff's return on the writ of restitution) on August 20, 2013. CP 343. Thus the Estate knew

it was the sole manager since August 2013 – long before Ms. DuBois claim that she didn't have control over the property until April 1, 2014. CP 253. Also on reconsideration Spice demonstrated that the water bills showed a change from the end of 2013 of no water use (as the property was vacant) going to 6100 cubic ft. on February bill (with a warning that described it as a "very large l[ea]k" before increasing almost 550% to 33,500 cubic feet on April bill. CP 342, 364-368. City of Puyallup water records indicate on February 21 and again on the 25th the Estate or SJC Management was notified of the leak by voicemail and by phone. CP 364.

The Estate is eager shirk the responsibility of waste occurring on the Triplex to SJC Management. Its primary argument is that SJC was managing at the time of the leak. The evidence presented by Spice demonstrates that SJC Management ceased managing sometime near August 20, 2013. A full seven months before the Estate claims to have bothered inspecting the triplex, which had a "large l[ea]k." CP 342, 364-368. The trial court agreed the damage "should have" been repaired, but that there was no evidence that the Estate "was involved in the management when that occurred." Oct. 16, 2015 RP 38:19-25.

Even if SJC Management was managing during the water leak, SJC Management was indemnified by the Estate and agreed to defend SJC Management "from all suits, damages, claims of any nature or any kind

arising in connection with Agent [SJC] management of the property and from any liability for injuries suffered by any person while in the property.” CP 613. Thus the Estate is responsible regardless of SJC’s management.

All of the evidence taken together with all inferences resolved in favor of the nonmoving party, Spice, shows that is not only possible that the Estate was managing the Triplex when the water damage occurred, but that it is probable that it was. The Estate either had actual knowledge of the ongoing water leak or it should have known of the leak and taken steps to repair it. Omitting the duty to prevent substantial damage is waste.

3. Waste with regard to mortgage debt

The mortgages on the co-owned properties have been a continued source of tension. The Estate, it is believed, takes the untenable position of increasing mortgage debt, making the Estate insolvent, transferring the properties to the personal representative’s bankruptcy estate, and then cramming down debt. The Estate’s non payment of mortgages caused, naturally, the imposition of penalties and the cancellation of mortgage modifications that Spice had negotiated. CP 286, 294, 301.

4. Waste with regard to 11007

There was a clear misunderstanding of the allegations involved by which both the Estate and Spice bear responsibility. The misunderstanding relates to a mistake of fact generated by a prior attorney representing Spice who, in drafting the amended complaint, changed the allegations in Spice's pro se complaint (Pierce Superior No. 14-2-08948-7) from alleging damage to "11007 two Bedroom house" to an allegation that "similar damage to the *two-bedroom house at 11305 58th St. Ct. E.*". cf CP 984, 31 (emphasis added). In Spice's pro se complaint it described the damage as occurring because "Defendants did not repair or turn off a gushing water heater supply line for 13 months. Although confined to the kitchen, the black mold and rot ruined the Kitchen cabinets, counter tops, walls and subflooring. \$3,000 damage occurred." CP 984. Spice's amended complaint is nearly identical to the language as Spice's pro se complaint except for the change in address. cf CP31-32 and 983-85

With regard to the 11007 House the only testimony presented, at all, was that Ms. DuBois stated "[t]here was no leak at the 11305 two-bedroom home" and that when she inspected all the properties in April 2014 "I found the properties to be in substantially the same condition as when Mr. Spice stopped collecting rent . . . except for the water damage [to the Triplex]." CP 253-254.

Interestingly, although Ms. DuBois referenced 11305 as a “two bedroom” house, 11305 House is actually a three bedroom home. CP 347. 11007 House, however, is a two bedroom house. CP 297.

Spice responded to the allegation with a declaration of his own, a declaration from a repairman, Jeff Payne, an accounting report, and, on reconsideration, pictures. Spice consistently argued that 11007 58th St. Ct. E. suffered water damage (never mentioning 11305 58th St. Ct. E.). Spice testified that “the damage to the 11007 58th St. Ct. E. Puyallup house (also from water damage) was less severe [than the Triplex], but still extensive.” CP 285.

Although the cause of action relating to the 11007 House wasn’t decided, the current ruling prohibits Spice from seeking recourse as the 11007 House damage would be subject to collateral estoppel. Spice respectfully requests that in remand he be specifically permitted to amend his complaint to correct the typographical error.

iii. Misappropriation of funds

As the Estate was the party moving for summary judgment it “bears the initial burden of showing the absence of an issue of material fact.”

Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Only after such a showing does “the inquiry shift[] to the party

with the burden of proof at trial.” Barker v. Skagit Speedway, Inc., 119 Wn.App. 807, 811 n.2, 82 P.3d 244 (2003).

It is undisputed that the rental income derived from the co-owned properties was to be divided between the owners. See CP 83, 102. The only question is whether the Estate withheld funds that belong to Spice.

For months Spice had been resorting to motions in the trial court to compel the Estate to provide a proper accounting. The trial court ordered accountings on February 6, 2015 (CP 82), April 2, 2015 (CP 96), June 12, 2015 (CP 102)(requiring “details of the itemization of Mr. Spice’s . . . share . . . sufficient to show the source of incoming funds and expenses paid, and the calculations of the resulting amount payable to Mr. Spice.”).

At summary judgment, the trial court incorrectly placed a burden of production on Mr. Spice at summary judgment to produce evidence of misappropriation. The Estate made no factual showing in its motion for summary judgment or on reconsideration. The Estate did not even produce a bare denial. Therefore, the burden never shifted to Spice. Nevertheless, , Spice presented testimony from himself and his expert accountant (Ms. Woods) regarding missing rental funds and also on reconsideration Ms. Woods testified with certainty that the Estate withheld \$49,000 in rental income belonging to Spice. CP 623. Given that testimony and her prior accounting it is clear that the facts taken in a light favorable to the

nonmoving party show that misappropriation occurred by the Estate or *at least* that the Estate did not disprove the possibility of misappropriation.

F. Kitsap Parcel property taxes

Spice has also sought to be reimbursed for the property taxes he paid on the Kitsap Parcel. The Estate below merely claimed “there is no obligation of the estate to pay property taxes for property *it does not believe* to have value.” CP 116 (emphasis added). This is contrary to well settled common law. In Cook v. Vennigerholz, 44 Wn.2d 612, 616 (1954) the Washington Supreme Court stated the traditional²⁶ rule as “when an encumbrance upon a cotenancy is paid off by one of the cotenants, he is immediately subrogated to the rights of the encumbrancer, in so far as the amount chargeable to the other cotenant is concerned.” RCW 84.64.060 provides that a “person owning a recorded interest in lands . . . upon which judgment is prayed, as provided in this chapter, may . . . pay the taxes . . . and for the amount so paid he or she will have a lien on the property liable for taxes, interest, and costs.”

²⁶ Strictly speaking, the Vennigerholz Court restated the common law rule and that court’s restatement is now the traditionally cited formulation of the rule in Washington.

As Spice is entitled to a lien to ultimately compensate him for these taxes he paid, and as the probate will have the effect of transferring the Estate's interest to its beneficiaries (Mrs. DuBois), the probate matter below was the proper time to adjudicate the amount of that claim.

G. Spice's motion for reconsideration should have been granted

Initially, Spice attempted to provide to the trial court a summary of "literally thousands of pages of records" that his expert accountant reviewed and summarized. See CP 623. The trial court rulings indicating insufficient evidence imply the court required the underlying materials. On reconsideration Spice presented clarifying details to the accounting summary including demonstrating a discrepancy between the personal representative's bankruptcy records (which tracked rental income being received), the owner statements from SJC management, and the First Security Bank records to note that \$8,614 in funds "disappeared for no obvious reason." CP 623 . 2. Ms. Woods also elaborated on her earlier assertion that the Estate used co-owned rental proceeds to pay \$11,778.69 in "unnecessary payment of [u]tilities" by examining more than 40 records to discover \$1,992.98 was spent paying for the utilities (in part) of a sibling of the

personal representative while the sibling was a tenant on the 11007 unit. CP 300 (earlier assertion), 624 (expounding). Regarding the decedent's activities she also clarified that the decedent had appropriated \$958,000 in operating capital while alive, which was not discovered until March 2012. CP 624.

The language contained in the trial court's ruling would seem to forever bar Spice from seeking to be compensated for any increase in value or funds expended on the co-owned properties. Spice has paid more than \$8,060.51 of his own funds to improve the co-owned properties. CP 624. He also paid \$6,464.03 of his own funds to prevent foreclosure on two of the co-owned properties. CP 624.

With regard to the Kitsap Parcel taxes Spice maintains that in the absence of a payment being adjudicated at the trial court level upon transfer from the Estate to the heirs, on reconsideration Spice wanted the trial court to at least modify its ruling to not forestall the remedy of a senior lien that Spice should be entitled to as discussed *supra* in the event the Estate or heirs of the estate seek to partition and sell the properties.

H. The trial court's award of attorney fees should be reversed and remanded

- i. RCW 11.96A.150 does not allow an Estate to always be subject to or have available attorney fees

The trial court indicated that it had authority under RCW 11.96A to award attorney fees based on the litigiousness of Spice. January 8, 2016 RP 13:17-14:22. RCW 11.96A.150 provides a court discretion to award reasonable attorney fees “to all proceedings *governed by this title*, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters.” (Emphasis added).

The dispute with Spice is not a matter “governed” by Title 11. None of the claims put forward concern the management or administration of an estate as an estate. The claims concern allegations of how a co-owner of real property acted toward another co-owner and with respect to the co-owned property. Permitting attorney fees in this matter would mean any lawsuit against an estate is subject to attorney fees merely because the alleged defendant is acting on behalf of a deceased individual. Even if some of the issues for which attorney fees were sought are governed by Title 11 such that RCW 11.96A.150 applies, then only those issues should be considered. However, the trial court did not adequately explain what fees being sought (by either party) were awarded or were the basis for an “offset.”

- ii. The superior court only permitted attorney fees based upon “prior orders” not granting fees overall, but then permitted the Estate to seek generalized attorney fees

The trial court, in granting summary judgment, indicated that “[i]f *either party* has any right to request attorney fees, damages or other relief based *on a prior ruling* of this court in the above-entitled matter, including the two consolidated matters, that party must bring a motion for such relief within 60 days or be forever barred from seeking such relief.” (Emphasis added). CP 339-40. Although the Estate included an attorney fee request in summary judgment, it did not argue for it at oral nor seek to include attorney fees for the summary judgment at presentation.

- iii. The superior court did not adequately provide a factual basis for its award of attorney fees.

The trial court did not offer a sufficient basis for its calculation. “Trial courts must actively assess the reasonableness of *all* attorney fee awards and may not simply accept the amounts stated in fee affidavits.” Estate of Bremer v. Walker, 187 Wn.App. 450, 459, 348 P.3d 1245 (2015) (emphasis added). Generally this is done by considering the number of hours “reasonably expended” multiplied by a reasonable hourly rate. Id.

Further, “Trial courts must exercise their discretion on articulable grounds, making a record sufficient to permit meaningful review.” Id. (citing Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998); Just Dirt, Inc. v. Knight Excavating, Inc., 138 Wn.App. 409, 415, 157 P.3d 431 (2007). Generally, “the trial court must supply findings of fact and conclusions of law sufficient to permit a reviewing court to determine why the trial court awarded the amount in question. Bremer, 187 Wn.App. at 459. (Internal citations omitted). Thus, “[i]f the trial court does not make findings of fact and conclusions of law supporting the attorney fees award, the preferred remedy is to remand to the trial court for entry of proper findings and conclusions. Berryman v. Metcalf, 177 Wn.App. 644, 659, 312 P.3d 745 (2013), review denied sub nom., Berryman v. Farmers Ins. Co., 179 Wn.2d 1026, 320 P.3d 718 (2014).

The Estate primarily put forward as evidence for fees the billing statements of various attorneys representing the Estate or Mrs. DuBois in numerous matters including unrelated bankruptcy and evictions matters that were dismissed. See CP 641-48, 654-70, CP 758 (dismissed evictions). Interestingly, the Estate also sought fees for matters where fees had already been awarded. CP 738-39.

Spice presented a thorough review²⁷ of the Estate's attorney fees by both providing a summary spreadsheet combined with marked versions of the Estate's records. CP 752-770. Spice pointed toward unreasonable fees such as the \$875 the Estate billed to submit notices of appearances, which is a pattern form Pierce County Superior Court e-filing system, LINX, generates. CP 743.

Spice maintains that he was entitled to recover attorney fees and damages for those prior rulings of the trial court that envisioned the possibility of attorney fees. On appeal, however, an adequate review is impossible. The trial court awarded the Estate an amount without specifying any basis with regard to the amount. Furthermore, the trial court made no findings whether the Estate was benefitted in the litigation. See Estate of Niehenke, 117 Wash.2d 631, 647-48, 818 P.2d 1324 (1991) (noting that generally the estate must be benefitted for an award of fees); accord Estate of Black, 153 Wash. 2d 152, 174 (2004); see also Guardianship of Lamb, 173 Wn.2d 173, 198, 265 P.3d 876 (2011) (denying attorney fees "because the litigation has not benefitted the guardianship estates"). Thus Spice seeks as an alternative to reversal regarding attorney fees that this Court remand for a determination as to what fees the trial court deemed appropriate, and, instruction that only

²⁷ On appeal the amount of attorney fees, if any, isn't subject to proper review as the trial court provided an insufficient basis for the amount of attorney fees ruling.

those fees benefitting the estate and relating to RCW Title 11 are compensable.

I. Spice's motion for a continuance was improperly denied

The "purpose [of summary judgment] is not to cut litigants off from their right of trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists.*" Keck v. Collins, 184 Wn.2d 358, 369, 357 P.3d 1080 (2015) (quoting Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605 (1960) and Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940)). The trial court expressly indicated that its order dismissing Spice's claims for misappropriation and waste was based on a lack of evidentiary support. CP 788.

The Estate filed the motion for summary judgment on September 17, 2015. CP 106. The motion was heard on October 16, 2015. Oct. 16, 2015 RP 1. Thus Spice had only twelve working days to respond to a dispute years in the making with new counsel. See CR 56 (c); see also CP 95, 281 (different attorneys representing Spice at different times).

Spice's ability to marshal his evidence was not yet complete. Several subpoenas had been submitted relevant to Spice's claims, but had not yet been returned. CP 512. The trial court expressly indicated that its order

dismissing Spice's claims for misappropriation was based on a lack of evidentiary support. CP 788. Norma Woods of Elite Tax and Financial Services LLC testified to the Court that she has been unable to fully complete her audit of the financial records of the Estate as a result of the actions of the Estate. CP 622-23. She indicated that the accounting provided by the Estate utilized unacceptable accounting principles and that responses were provided from the Estate in an unusable format. CP 623.

Spice testified he was "still investigating to determine where some of those funds have gone since the Estate" failed to pay property taxes and mortgage penalties. CP 286. The accounting provided by Spice indicate that the "Total Loss Rent and Revenues" was \$187,300 with almost \$36,000 in rent "missing." CP 300. Thus a continuance was paramount to reaching a just verdict based on all the evidence.

Spice had also intended to reintroduce the claim by Plexus Investments LLC against the Estate and noted that to the trial court. CP 272. While Plexus had previously filed a complaint it was, erroneously dismissed when Spice amended the complaint to clarify issues. CP 272:12-19, 278, March 20, 2015 RP 5, April 1, 2015 RP 4:9-12 ("two of those cases were dismissed by stipulation with" the Estate.

In addition to evidence still sought to be acquired there was evidence that was either prepared immediately after summary judgment or was

presented to expound upon existing summaries. In total this included almost an additional 300 pages of exhibits (CP 349-618). These exhibits were submitted as part of Spice's motion for reconsideration and motion to allow late filing of a declaration of Norma Woods wherein she stated that in her accounting she "determined that the Estate has failed to pay Spice \$49,000 in rental income." CP 623:14-16.

The trial court denied the motion to allow the late filing of Norma Woods declaration. CP 791. In so doing the trial court abused its discretion by failing to consider the mandatory factors in Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997). The Washington Supreme Court has maintained that "the decision to exclude evidence that would affect a party's ability to present its case amounts to a severe sanction" that cannot be imposed without analyzing the three *Burnet* factors on the record. Keck v. Collins, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015). This includes "untimely evidence submitted in response to a summary judgment motion." *Id.* at 369.²⁸ Thus the trial court should have analyzed "whether a lesser sanction would probably suffice, whether the

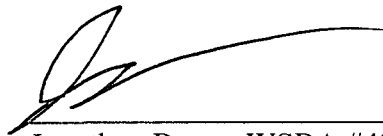
²⁸ No published court decision has yet considered whether Keck applies to late filed evidence submitted after a summary judgment hearing during a motion for reconsideration. As the central reasoning behind Keck is to require summary judgment motions to be considered on their merits and with the full marshalling of evidence to be available, even if late. Not considering evidence that is submitted late before fully dismissing a lawsuit, without a trial, is a harsh sanction that a court should apply the *Burnet* factors before imposing.

violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party” Id. at 369. Failure to engage in the inquiry is an abuse of discretion. Id. at 368.²⁹

IX. CONCLUSION

The trial court rushed to dismiss this matter. In its rush to dismiss this matter the trial court disregarded substantial factual support for Spice’s claims. It rushed to deny a continuance to allow Spice to correct an oversight that removed Plexus as a Plaintiff. It rushed to grant attorney fees to the Estate without carefully considering why it was granting attorney fees, for what basis, and for which fees. It also rushed to not permit Spice to fully present his case by striking late filed evidence. Nevertheless, at summary judgment Spice presented evidence sufficient to raise several issues of material fact.

DATED this September 6, 2016



Jonathan Baner, WSBA #43612
Attorney for Appellant

²⁹ Additionally, the remedy on appeal is remand. Appellate courts cannot perform a Burnet analysis when the trial court omits it. Jones v. City of Seattle, 179 Wn.2d 322, 338, 314 P.3d 380 (2013).

CERTIFICATE OF SERVICE

I, Cole Weddle, a person over 18 years of age, declare that I delivered an original and copy to the Court of Appeals and mailed a true and correct copy to Patrick Hanis. I declare under penalty of perjury under the laws of the State of Washington that the forgoing is a true and correct statement. Signed at Tacoma, WA on September 6, 2016.


Cole Weddle